No. 3436

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

F. M. HATHAWAY, et al.,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF

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Apellee's Brief brings in sharp outline the following questions:

Question 1: The validity of the contract.

Ford Company urges that this Court has sustained its contract in

Ford Motor Company vs. Boone Company, 244 Fed. 355, decided November 1, 1917.

There the decision was not based upon the practical transactions between Ford Company and its agents.

However, the Sixth Circuit Court of Appeals in Ford Motor Company vs. Union Motor Sales, 244 Fed. 156, decided October 25, 1917, held the contract void for conflict with the anti-trust laws:

One main difference noted in these cases relates to the clauses concerning rebates. This Court, through Judge Dietrich, says:

(244 Fed., 339): "It is to be admitted that the plaintiff, before parting with possession of its cars, requires the payment by the consignee of the entire money consideration which it expects to receive. Indeed, *if the aggregate of the sales consummated by the consignee in a year* exceeds a certain amount, the plaintiff is under obligation to return to it a part of the advance payment by way of commissions."

The Sixth Circuit Court of Appeals took the opposite view of this question. It said (244 Fed., 158):

"For example: Plaintiff agrees to sell 'its product to the dealer licensee' at certain discounts from list prices and to allow certain additional rebates scaled on the 'net amount of business' done, *which plainly means the amount of the dealers' purchases from the plaintiff;* the dealer agrees to take deliveries and to 'purchase the said Ford automobiles' in various months specified."

The testimony of Witness Hathaway heretofore quoted (our opening Brief, top of page 17) shows that the Ford Motor Company did business as the Sixth Circuit Court of Appeals said, namely: It allowed rebates on amounts of purchases from it and did not confine them to resales.

Furthermore, the drafts accompanied by bills of lading are *bills of sale for net cash,* and the contract at clause 7 (Tr., page 13) reads:

"(7) Second party shall arrange all sales of Ford automobiles for cash only; but if the second party should accept anything but cash payment on Ford automobiles, it must be upon his own responsibility and for his own

account solely, and he must remit cash only to first party."

That clause gives direct authority to the agents to sell on whatsoever terms they may see fit, provided only that Ford Company is paid its money. This was done before the cars were unloaded.

These facts show that aside from the words of the contract the transaction between Ford Company and appellants was one of sale and not of bailment, and that title passed, and that the parties by their course of conduct made their transactions one of purchase and sale and not of bailment, as heretofore urged.

If this view is correct, this case must be reversed because the mortgages were Winchell and Hathaway's mortgages on their own property and Ford Company was a volunteer in making the payment within the meaning of

Parker vs. Lancaster, 84 Maine 515, 24 Atl. 952.
Ash vs. McClellan, 62 Atl. 598.
Dickerson vs. Lord, 89 Am. Dec. 579.

Judge Bean's opinion does not consider this fact of rebates on unsold cars; but to us it seems one of the crucial points of the case.

Ford Company knew the limitations placed upon its own "agents"—and their want of power to mortgage Ford Company's property as well as to assign the pretended *"lien."* That company also knew of its course of dealing with these appellants, as heretofore shown.

Question 2. Were the mortgages valid? Was Ford Company compelled to pay them?

If title to the machines passed to appellants then Ford Company was not affected by the lien thereby created.

If such title never passed, then such mortgages were void as to the Ford Company (Bailor) and their payment was a voluntary act.

The contract (if valid) created a personal, non-transferable, limited and prescribed agency. Ford Company exercised its right of personal selection—delectus personarum—in choosing its agents; that right of selection was one of which Ford Company could not be deprived.

Suppose the bank had foreclosed the mortgage; could it by becoming the purchaser at the sale, be substituted as the sales agent in place of Winchell and Hathaway? Could it transfer title to purchasers under clause 7 of the contract? Exactly what interest or lien upon the machines would the First National Bank sell if it should foreclose? And again, if the bank should have foreclosed, would the sale be public? Could Dodge Bros. Company or the Maxwell Company or the Studebaker Company or any other rival of the Ford Company buy in the interest sold under the mortgage foreclosure and thereby become the agents of the Ford people?

This contract is either one of sale or bailment. There is no middle ground. If of sale, then title passed to appellants, and the case must be reversed; but if of bailment, then Winchell and Hathaway had no power whatsoever other than that expressly conferred, and any attempt on their part to deal with the property in any way other than in strict compliance with the terms of the bailment, was wrongful and would render them and the bank both liable.

Such, in fact, is the plain expression of the contract. See Par. 15, Tr. p. 12; Par. 16, Tr. p. 16; Par. 27, Tr. pp. 22-23. See also

Shank vs. Saunders, 13 Gray (Mass.) 37.
Dunlap vs. Gleason, 16 Mich. 158.

93 Am. Dec., 231, says:

"The bailment by its terms imports a personal trust which could not be transferred."

See *Norris vs. Boston Music Co.,* 151 N. W. 971, holding that bailor can pursue and recover property even in hands of purchaser in good faith.

6 C. J. 1147-48. Paragraphs 3 and 4—text.

Therefore, Winchell and Hathaway could not mortgage the property if it belonged to Ford Company, nor could they transfer or assign their alleged or pretended lien. Such act renders them and the bank both liable either in replevin or conversion.

24 R. C. L. 488, Sec. 781, note 19-20.

Wood vs. Nichols, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773.

Ivers & Pond vs. Allen, 8 Ann. Cas. 129, note.
24 R. C. L. 792, p. 500.

The fact is that Ford Company should have joined the bank as defendant in this replevin case because a bailee for sale has no right to mortgage.

Thirlby vs. Rambow, 93 Mich. 164, 53 N. W. 159.

Ford Company's brief in this case concedes that there was no necessity for paying these mortgages. From the bottom of page 11 of Appellant's Brief we quote:

"Instead of taking legal steps to remove such cloud the Ford Motor Company adopted the shorter method of making the payment in controversy."

Such payment is entirely voluntary and can afford no basis for subrogation.

It is plain that Ford Company (if title to the cars

remained in it) was under no duty to pay the indebtedness secured by the mortgages; but that it could have removed the pretended lien by any of the following methods:

(1) By joining the bank as a defendant in the replevin action.

(2) By suit against the bank and appellants compelling them to wage their claim against each other.

(3) By action of conversion against the bank, thereby compelling that institution to pay the Ford Company the entire price of the cars. This would make the bank pay the Ford Company instead of Ford Company paying the bank.

(4) By setting out its alleged and pretended equities in its reply in the replevin case.

Appellant's Brief at page 16 says:

"The above record establishes that the payment * * * was made by the Ford Motor Company for the purpose of aiding its replevin action by relieving the title to the cars sought to be replevined from the equitable lien created thereon by Messrs. Winchell and Hathaway, etc."

Judge Bean did not find that Ford Company was compelled to pay the indebtedness to get rid of the lien. He says:

"(Appellant's Brief, Exhibit A, page 59.) Under the contract between the plaintiff and defendants as interpreted by the Court of Appeals in the *Boone* case (244 Fed. 335) the title to the automobiles was in the plaintiff notwithstanding the defendant had advanced and paid to it the entire amount it was entitled to receive under the contract. It therefore had an interest in

the property which it could protect by paying the lien. *It thus made the payment to the bank in good faith believing that it was necessary to do so in order that it might recover possession of its property, and to enable it to proceed with the replevin action.* Having done so it is, in my opinion, entitled to be subrogated to the bank as against the makers of the mortgage. (37 Cyc. 378.)"

Judge Bean did not hold that the Ford Company paid the indebtedness as a matter of *necessity* or of compulsion. He held only that Ford Company "believed that it was necessary, etc."

The opinion, as well as appellant's brief, says that the payment was made in aid of the replevin case, thus establishing the necessity of setting forth all rights claimed to arise from such payment, in the reply.

By this method all questions involved in this case would have been drawn into and become an integral part of the replevin action.

A reply setting up these alleged equities of the Ford Company would necessarily embrace the questions of the validity of the mortgages, the amount paid by Ford Company, the necessity of such payment, the character of the lien (if any) which the bank acquired and the entire relation involved in this suit.

Judge Bean's opinion was controlled by the Boone case supra; he disregarded the facts showing that title passed by the course of dealing, as heretofore shown, and therein committed error.

Question 3. The Amount of Rebates.

The question of rebates shows the following situation:

1. The answer claimed $1900.60;

2. The court found $2325.58, but deducted the draft, erroneously, as we think;

3. The testimony of Witness Norman (Trans. 303-6) showed rebates of $3401.12.

Appellee's Brief says (page 21) that our argument is based upon some *"transposition of figures."* This contention is not true. Witness Alling (Trans. 235-6-7 et seq.) says:

"A. We figure a balance due of $1338.10.

"Q. A balance due of how much?

"A. Balance due as rebate of $1338.10.

"Q. Please advise the Court how you arrive at that computation.

"A. The total rebate due, as we figured it, was $2325.58, of which they were paid $987.48, leaving a balance as I figure it of $1338.10.

"THE COURT—Leaving a balance of what?

"A. $1338.10.

"COURT—How do you arrive at that conclusion? *How many cars did they purchase?*

"A. *Those figures have not all been added together.*

"Q. Have you a copy of that typewritten statement showing this computation you showed me yesterday?

"A. None other than this.

"Q. I thought you had a typewritten computation yesterday attached to the letter.

"A. Only the totals of one hundred and sixteen cars.

"THE COURT—One hundred and sixteen? How many do these receipted bills show?

"MR. SMITH—We are claiming one hundred and seventy-nine.

"THE COURT—I know, but I do not know whether you have checked up these receipted bills.

"MR. HARDY—Some of these receipted bills were offered in evidence at the former trial showing a continuing custom of doing business.

"THE COURT—Never mind. If you have not checked them up it does not make any difference."

This testimony shows that Alling admits that his computation did not include all of the cars.

By taking the 179 cars claimed by us at the rate allowed by Alling we find the following computations: 116 cars: 179 cars ::$2325.58;x—the result is $3593.61, and their own witness, Norman, at the record quoted supra admits $3401.12. The Court's error is obvious.

The testimony of Ford Company was not sufficient to show that the $900.00 check should be credited on the amount admitted even by Alling.

Appellee says that we were allowed more than we asked; but in this suit in equity all the parties were before the Court.

Question 4. Voluntary Payment.

Appellee's Brief (pages 8 and 9) states a theory of recovery not involved in either cause of suit. It argues that Winchell and Hathaway got money twice as follows:

a. From the bank on the mortgage;

b. By the payment to the bank.

If those mortgages were made as agents of Ford Company, as set forth in the first cause of suit, then Ford Company simply paid its own debt.

Appellee's Brief (pages 6 and 8) admits that the money obtained from the mortgages was paid to Ford Company. Therefore that Company received the money from the bank and paid the money back to the bank. If appellee's theory is correct the Ford Company paid its own debt, not ours.

Question 5. Were all matters involved here, justiciable in the replevin case?

Appellee's Brief does not controvert our position either as to facts or law on this point. On the other hand, their brief (page 16) says, in reference to the payment:

> "The above record establishes that the payment of the $12,676.25 to the First National Bank of Eugene, Oregon, was made by the Ford Motor Company FOR THE PURPOSE OF AIDING ITS REPLEVIN ACTION BY RELEASING THE TITLE TO THE CARS SOUGHT TO BE REPLEVINED FROM THE EQUITABLE LIEN CREATED," etc.

Their only claim against our argument is made at page 18 of their brief, wherein they say that the fact which distinguishes this case from all others is that appellant's attorney (Isham N. Smith), "who now appears as attorney for appellants in this case and urges that this same matter which he himself eliminated from the replevin action, cannot now be considered because it should have been adjudicated in that case."

The objection in the replevin action was not based upon procedure or any technical ground; but because the payment was purely "voluntary." This objection was sustained by the Court; an exception was noted by the Ford Company, the exception was preserved in the Bill of Exceptions and specified as error, and thereafter was not argued or presented to this Court and hence was waived.

At the argument on appeal in the present case Ford Company sought to give the impression that the objection to the testimony last referred to was on technical grounds of procedure. That company did not so understand the objection at the time it was made. If the objection was solely on grounds of procedure, then Ford Company would never have preserved its record in error on the ruling.

Furthermore, there is neither pretense nor claim that any position of Winchell and Hathaway's attorneys prevented or dissuaded or misled the Ford Company's attorney into failure to set out its pretended rights in the reply, and this is the fatal point.

That reply was drawn after the payment was made. The Act of Congress was in force almost one year before this case was filed. The failure to set forth all equities in the reply is directly contrary to the requirements of the Act of Congress, as heretofore shown.

Under the state of the pleadings, objection on procedural grounds along might properly have been made. We did not seek adjudication as to form or method, but as to substance, and we believe that the question of the payment to the bank was directly involved in the replevin case, because

(1) The character of that payment, whether voluntary or otherwise, was raised by our objection;

(2) The amount of the payment was necessarily embraced in the question of,

(a) Winchell and Hathaway's interest in the property;

(b) The value of the right of possession;

(c) The right of possession as an abstract question;

(d) Tender;

(e) The change of relation pendente lite;

(f) The character of lien (if any) which the bank acquired.

But, barring all these, if Ford Company is right in its contention that it made the payment by necessity—and not by choice—it has the legal remedy of money had and received. Its resort to equity was unavailing.

At page 19 of its brief appellee quotes from the opinion of Judge Bean as follows:

> "The only question in that case was the value of the property taken by plaintiff under the writ of replevin, in case it could not be returned, and damages for such unlawful taking."

This shows that the value of Winchell and Hathaway's interest was directly involved in the replevin case. The original complaint alleged the value at over sixteen thousand dollars; the amended complaint alleged the value at a little over thirty-four hundred dollars; the jury returned a verdict for over sixteen thousand dollars as the value of our property and the question of the payment to the bank was directly involved in fixing the extent of our property.

At the top of page —— of Ford Company's Brief it is said that "It is admitted in this case that * * * mortgages constituted a cloud upon the title," etc.

Enough has been said to show that our admission of the validity of the mortgages is contingent upon our ownership of the property.

We submit that the Ford Company has had its day in court and that the decree should be reversed.

Respectfully submitted,

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Attorney for Appellants.